ing, that the plaintiff had a clear right of action upon the sealed instrument; he might aver in his declaration that he had, in part, performed the work, and was ready to do the rest, but was prevented by the defendant. And whenever a man *may* have an action on a sealed instrument, he is bound to resort to it.

Judgment reversed.

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If a claim be set up under the sentence of condemnation of a foreign court, *this* court will examine into the jurisdiction of such court; and if that court cannot, *consistently with the law of nations*, exercise the jurisdiction which it has assumed, its sentence is to be disregarded; but of their own jurisdiction, so far as it depends upon *municipal laws*, the courts of every country are the exclusive judges. Every sentence of condemnation by a competent court,

THIS was an appeal from the sentence of the *circuit court* for the district of South Carolina, which reversed that of the *district judge*, who awarded restitution, to Rose the libellant, of certain goods, part of the cargo of the American *schooner Sarah*.

This vessel after trading with the brigands, or rebels of St. Domingo, at several of their ports, sailed from thence, with a cargo purchased there, for the United States; and had proceeded more than ten leagues from the coast of St. Domingo, when she was arrested by a *French* privateer, on the 23d of February, 1804, carried into the *Spanish* port of *Barracoa*, in the island of Cuba; and there, with her cargo sold by the captors, on the 18th of March, 1804, before condemnation, but under authority, as it was said, of a person who styled himself agent of the government of *St. Domingo*, at *St. Jago de Cuba*. The greater part of the cargo was purchased by ——— Colt, the master of an American vessel called the *Example*, into which vessel the goods were *clandestinely* transferred from the *Sarah*, in the night time, and brought into the port of Charleston, in South Carolina, where they were followed by Rose, the supercargo of the Sarah, who filed a libel against them, in behalf of the former owners, complaining of the unlawful seizure on the high seas, and praying for restoration of the goods: whereupon process was issued, and

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the goods were arrested by the marshal, on the *4th of May*, 1804. No steps appear to have been taken by the French captors, towards obtaining a condemnation of the vessel, until time enough had elapsed for them to receive information of the proceedings against the goods in this country. The forms of adjudication were begun in the tribunal of the first instance, at *Santo Domingo*, in July, 1804, and the condemnation was had before the middle of that month.

This condemnation purports to be made conformably to the first article of the *arrete* of the captain general (*Ferrand*) of the *1st of March*, 1804, which was issued six days subsequent to the seizure of the vessel.

This article was as follows; "The port of Santo Domingo is the only one of the colony of Santo Domingo, "open to French and foreign commerce; consequently "every vessel anchored in the bays, coves and landing "places of the coast occupied by the revolters, those "destined for the ports in their possession, and coming "out with or without cargoes; and generally every "vessel sailing within the territorial extent of the island, "(except between cape Raphael, and the bay of Ocoa,) "found at a less distance than two leagues from the "coast, shall be arrested by the vessels of the state, "and by privateers bearing our letters of *marque*, who "shall conduct them, as much as possible, into the port "of Santo Domingo, that the confiscation of the said "vessels and cargoes may be pronounced."

On the 6th of September, 1806, no sentence of condemnation having been produced in evidence, the judge of the district court decreed restitution of the property to the libellant, from which sentence the other party appealed to the circuit court, and there produced the sentence of condemnation, by the *tribunal of the first instance*, at *Santo Domingo*. The circuit court reversed the sentence of the district court, and dismissed the libel.*

having jurisdiction over the subject matter of its judgment, is conclusive as to the title to the thing claimed under it.

The prohibition, by France, of all trade with the revolted blacks of Santo Domingo, was an exercise of a *municipal, not* of a *belligerent* right; and seizures under that prohibition were only authorised within two leagues of the coasts of that island.

A seizure beyond the limits of the territorial jurisdiction, for breach of a municipal regulation, is not warranted by the law of nations; and such a seizure cannot give jurisdiction to the courts of the offended country; especially if the property seized, be never carried with-

* The reasons of the circuit court are stated by Judge Johnson, in this sentence, see Appendix, note (C).

From this sentence, the libellant appealed to this court.

For the libellant, the case was argued by *C. Lee*, *Harper*, *S. Chase, jun. Dallas*, *Rawle*, *Ingersoll*, and *Drayton*, and

For the respondent, by *Duponceau*, *E. Tilghman*, and *Martin*.*

For the libellant, it was contended,

1. That this was not a seizure *as prize of war*, but *as a forfeiture for violation of the municipal law of France*, and

2. That whether it were seized *jure belli*, or *jure civili*, it was not competent for the court, sitting at

in its territorial jurisdiction.

Quere, whether a French court can, consistently with the law of nations, and the treaty, condemn American property never carried into the dominions of France, and while lying in a port of the United States.

* This case was argued in connexion with the case of *Rose* v. *Groening*, which was a libel for another part of the cargo of the *Sarah*; and with the case of *La Font* v. *Bigelow*, from Maryland, which was an *action of replevin* by the original owner of goods condemned by the tribunal at Santo Domingo, under similar circumstances; and with the case of *Hudson and Smith* v. *Guestier*, also from Maryland, which was *trover* for the cargo of the *Sea Flower*, condemned upon similar grounds; and with the case of *Palmer and Higgins* v. *Dutilgh*, from Pennsylvania, which was *replevin* for the cargo of the *brig Ceres*, condemned under similar circumstances; and with the case of *Pluyment* v. *The Brig Ceres*, which was a *libel* in the district court of the United States at Philadelphia, for restoration of the vessel. These cases were all supposed to depend on the same questions, and by consent of counsel, with leave of the court, were argued as one cause. This accounts for the great number of the counsel employed, and for the great length of the argument, which consumed *nine days*.

Upon the opening of these cases, six judges being present, it appeared that three of the six judges had given opinions in the circuit court upon the principal points which were about to be argued, and that if each judge who had given an opinion, should withdraw from the bench, as had been customary heretofore, there would not remain a *quorum* to try the cause. It was thereupon agreed by all the judges that they would sit. *Chase, Johnson, and Livingston, Justices*, expressed themselves strongly against the practice of a judge's leaving the bench because he had decided the case in the court below. *Washington, Justice*, said he should not insist upon the practice, if it should be generally abandoned by the judges. The whole six judges (*Todd, Justice*, being absent) sat in the cause; so that the practice of *retiring* seems to be abandoned.

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Santo Domingo, to condemn the property, while it was in a *neutral* foreign port.

1st. Point.

This is not a case of prize of war, but of municipal forfeiture.

The tribunal of the first instance was a municipal court; and it is doubtful whether it had cognizance of questions of *prize of war*. But if it had a general prize jurisdiction, it could not, consistently with our treaty with France, (*Laws U. S. vol. 6. p. 34. art. 22.*) condemn a prize not carried into a French port. The words of the article are, "it is further agreed that, in all cases, "the established courts for prize causes, *in the coun-* "*try to which the prizes may be conducted*, shall *alone* "take cognizance of them." Hence it is to be inferred, that as they could not consistently with the treaty, take cognizance of the case as *prize of war*, they themselves must have considered it as a mere seizure, for violation of a municipal regulation. It is characteristic of *prize of war*, that it is done with a view to annoy *an enemy*. When a neutral violates his neutrality, he becomes *quoad hoc*, an ally to the enemy, and the ground of condemnation is always as enemy property. But here was no feature of public war. It was merely an insurrection. All the world considered the blacks of St. Domingo as revolted subjects. Our government has acknowledged the right of France to legislate over those colonies. The French arrete is not a measure of *war*, but of *government;* and is a mere municipal regulation to enforce obedience to her laws, and for the reduction of the insurgents. The law of France rendered the trade illicit, but a seizure for illicit trade, is not the exercise of a right of war. It had no relation to a state of war; and might have been passed, if the most profound peace had existed throughout the world.

In the year 1802, France, Spain, and England were at peace with each other, and with all the world. The proceedings of France against her revolted colonies, were of a *civil* nature; at least they were so considered by her. (*See Bonaparte's letter to Toussaint, and Le*

Clerk's letter of November, 1802, *and his address to the people of St. Domingo.*) Toussaint also considered himself as holding under the government of France, and to show his confidence, left his children in France as hostages.

The tribunals in *Santo Domingo*, were the ordinary tribunals of municipal jurisdiction, and not exclusively courts of prize. Their jurisdiction depended upon the *arretes* of the consuls of France, of the *18th of June, and 2d of October*, 1802,* (a time of profound peace,)

* The following is the arrete of 18th of June, 1802.

"Arrete of the consuls concerning the mode of administration of civil and criminal justice in the colonies restored to France by the treaty of Amiens.

"The consuls, &c on the report, &c. decree:

"1. In the colonies restored to France by the treaty of Amiens of 6th Germinal last, (27th March, 1802,) the tribunals which existed in 1789, shall continue to administer justice in civil as well as criminal matters, according to the forms of proceedings, laws, regulations, and tables of fees then observed, and so that nothing be innovated as to the organization, jurisdiction and competence of the said tribunals.

"2. The denominations of seneschalsea, admiralty and royal jurisdiction courts, shall be supplied by that of *tribunal of the first instance*; but from this change of denomination no change is to be inferred as to the jurisdiction of the ancient tribunals, and particularly of the courts of admiralty.

"3. The public ministry shall be exercised by commissaries of the government and their substitutes.

"4. There shall be provided a special regulation for the changes to be made in the present tribunals at *Tobago*.

"5. Judgments shall run in the name of the French Republic.

"6. The members of the tribunals shall be provisionally nominated according to the requisite forms, by the captain general. He shall receive from each of them a promise of fidelity to the French republic."

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and which refer to the year 1789, a time when France was also at peace with all the world. There was then no necessity of a prize court; and neither of those

The following is the arrete of 2d October, 180z.

"Arrete for regulating the forms to be observed for the proceedings and judgment of *contraventions* to the laws concerning foreign commerce in the colonies.

"The consuls, &c. on the report, &c. decree:

"1. The contraventions to the dispositions of the laws and regulations concerning foreign commerce in the colonies shall be proceeded on and adjudicated in the form herein after-mentioned.

"2. The *instruction*" (*proceedings in preparatorio*) "and *first judgment* shall belong to the *ordinary tribunal of the place where the prize shall have been conducted*, subject to an appeal in all cases to special commissioners, who shall pronounce in the last resort.

"The said *instruction* shall be made summarily and on simple memoirs.

"3. Within the extent of each captain-generalship, the commission shall be composed of the captain-general, the colonial prefect, the commissary of justice, or the grand judge; and in case of impediment of any of them, then of a substitute (*celui qui le remplace*) and besides, of three members of the court of appeal, chosen for each cause by the captain-general.

[Here follows a particular regulation as to *Tobago*.]

"4. In case of a division of opinions, that of the president shall preponderate.

"5. The inspector of the marine, or the officer of administration doing the duty of inspector, shall, of right, exercise the functions of the public ministry in the said commission of appeal.

"The functions of clerk shall be exercised by a secretary appointed for that purpose by the captain-general.

"6. As to the residue, the ancient laws shall be executed, so far as they are not altered by the present regulation.

"7. The minister of the marine and the colonies is charged with the execution of the present arrete, which shall be inserted in the bulletin of the laws.

(Signed) "BONAPARTE."

arretes allude particularly to the insurrection of the blacks. That of 2d October, 1802, relates generally to the smuggling trade of the colonies; and refers to the *ancient laws*, not to the laws of war; but the *municipal* laws. From the jurisdiction of the court, then, it cannot be inferred that this was a case of prize of war; nor will such an inference be drawn from the colonial regulations respecting the trade.

The first of these is the *arrete* of the captain-general, dated the 22d of June, 1802,* which is entirely municipal, and applies as well to French as to foreign vessels, and is limited in its operation, to within two leagues of the coast.

The next is that of the 9th of October, 1802, which is to the same effect.

The last is that of 1st March, 1804, which as to these cases was clearly *ex post facto*, but if applicable at all, shows itself to be merely an exercise of a municipal right. The sentence of condemnation itself, does not pretend to consider the vessel as prize of war, but as a seizure made for the violation of those municipal regulations of trade, which it recites. The order that the proceeds should be distributed according to the laws respecting prizes, would have been unnecessary, if it had been a case of prize, to which those laws would have applied independent of the order.

There would have been a gross inconsistency in France treating the revolters as rebels, and yet claiming that other nations should consider them as acknowledged enemies. Yet before France can claim the rights of war from neutrals, in regard to the insurgents of St. Domingo, she must

* The 13th article of that *arrete*, which is the only article referred to in the sentence of condemnation, is as follows:

"Every vessel, French or foreign, which shall be found by the vessels of the republic anchored in any of the ports of the island not designated by these presents, or within the bays, coves, or landings of the coast, or under sail at a distance less than two leagues from the shore, and communicating with the land, shall be arrested and confiscated."

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admit them to be *enemies*, and not *rebels*. If they are independent, and France is at *war* with them, France can claim from us only the rights which war gives. We shall have a clear right to trade with them, unless in contraband of war, or to blockaded ports.

It either is, or is not, prize of war. There are only two sides to the question. *Prize* is a seizure *jure belli*. There must be a *war* to raise a question of prize. No open war then existed with any nation. It is said that by aiding rebels we make a common cause with them; but the assistance, to justify such an inference, must be the act of the nation, not the unauthorised act of individuals. Until the year 1806, the United States had never declared the trade to be unlawful; nor did France require our government to take notice of the trade, until the fall of 1805. The law of nations does not authorise the seizure and confiscation of the property of foreigners trading with rebels. No authority to that effect has been cited from any writer upon that law. A state has, by the law of nations, a right to regulate its own trade. A parent state may chuse to exercise a greater or less degree of severity, with regard to the trade of its colonies. England did not, until 1776, wholly prohibit trade with her North American colonies. The statute of 16 *Geo.* III. *c.* 5. prohibiting such trade, would have been altogether useless, if such trade had been unlawful in consequence of the rebellion. It declares "that all manner of trade and commerce is and shall be prohibited with the colonies of New-Hampshire," &c. (naming the colonies,) "and that all ships and vessels of or belonging to the *inhabitants* of the said colonies, together with their cargoes," &c. "and all other ships and vessels *whatsoever*, with their cargoes," &c. "which shall be found *trading* in any port or place, of the said colonies, or *going to trade*, or *coming from trading*, in any such port or place, shall become forfeited to his majesty, *as if* the same were the ships and effects of *open enemies*, and shall be so adjudged, deemed and taken, in all the courts of admiralty, and in all other courts whatsoever."

The French arretes limit the right of seizure, to the extent of their territorial jurisdiction; but if they had

claimed a right under the law of nations, they would have authorised seizures as well on the high seas, as within two leagues of the coast.

The title of the arrete of *general Ferrand*, of the 10*th Ventose*, *year* 12, (1*st March*, 1804,) which is referred to in the sentence of condemnation is, "an arrete relative to vessels taken *in contravention to the dispositions* of the laws and regulations concerning the *French and foreign* commerce, *with the colonies*," and the reason of passing the arrete, is stated in the preamble to be, "that some of the French agents in the allied and neighbouring islands, had mistaken the application of the laws and regulations concerning vessels taken *in contravention*, upon the coasts of Santo Domingo, occupied by the *rebels*, and had confounded *these* prizes with *those made upon the enemies of the state*; wishing to put an end to the abuses which may result therefrom, and which are as derogatory to the *territorial sovereignty*, as they are to *neutral rights*," &c. &c. thus clearly taking a distinction in terms, between these municipal seizures, and prizes of war. The 8th article also speaks of *acquitting the accused* of *the contravention*, and the sentence of the appellate court, speaking of its jurisdiction, describes it thus "for pronouncing in the last resort upon appeals, from judgments rendered in the first instance, by the provisional commission of justice, sitting in the town of *Santo Domingo*, upon prizes made by the vessels of the state, and by French privateers upon *neutrals*, taken in contravention of the laws and regulations, concerning the *smuggling* trade of the colony," (a l'occasion des prises faites par les batiments de l'etat et par les corsaires François, sur les neutres pris en contravention, aux lois et reglemens concernant *le commerce interope* de la colonie.)

If this trade was illegal by the law of nations, there was no necessity for these French laws upon the subject.

2d. Point.

Whether the seizure were made as prize of war, or for violating a municipal law of trade, it was not compe-

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tent for the court sitting at *Santo Domingo*, to condemn the property *while lying in a foreign neutral port.*

No title could vest in the purchaser by a sale, without a condemnation; although, perhaps, a subsequent legal condemnation might relate back to the time of the sale, and vest a legal title in the purchaser. But the condemnation of the property in this case could not be a legal condemnation, while the property was not only in *South Carolina*, but actually in the custody of *our* law. It had got back to the country of its original owner, who had claimed the protection of our laws.

The mere capture, even by a belligerent and *jure belli*, does not divest the title of the property out of the neutral owner; but an order or sentence of some competent tribunal is necessary for that purpose.

The title of the captor, before condemnation, does not extend beyond his actual possession; and if he loses or quits the possession, his title is entirely gone. Here had been a change of possession before condemnation. If a captured vessel escape before condemnation, the title revests in the former owner. 4 *Rob.* 50. *The Henrick and Maria. Collection of Sea Laws*, 629. 8 *T. R. Havilock* v. *Rockwood.* 1 *Rob.* 114. *The Flad Oyen.* 2 *Bur.* 693. *Goss* v. *Withers. Institute* 2. 1. 17.

Although new evidence may be admitted upon the appeal, yet the sentence of condemnation in this case, ought not to have been admitted, because it was not the sentence of a competent tribunal. The question of competence is always open, whatever may be the law, as to the conclusiveness of a foreign sentence. The court at *Santo Domingo* had no jurisdiction over this coffee.

Incompetence, may arise from want of jurisdiction, as to the subject of litigation, or as to the place where the tribunal sits. Neither by the law of nations, nor by treaty, could it condemn property while it was in the custody of our laws, and in contest in our courts. Even if the property had been in *France*, it is very doubtful whether the court of *Santo Domingo* could have condemned it. The proceeding was *in rem*, and from the nature of things, the *res*, the *thing* against which the

suit is instituted, ought to be within the power and jurisdiction of the court before which it is tried; it ought at least to be in the same country. If it be a case of *mere municipal* jurisdiction, the court cannot proceed if the *thing* be in the country even of an *ally;* for an *ally* in a war, is not an *ally* as to the execution of the municipal laws of the *co-ally*. Suppose a seizure to be made by *Spain*, for an illicit trade in contravention of her municipal laws, and the vessel never carried into a *Spanish* port, but into a *French* port. The *Spanish* court could not proceed. One country will not enforce the municipal laws of another. In this country no court has jurisdiction *in rem*, unless the *thing* be within its jurisdiction. So by our treaty with *France*, no court has jurisdiction of a cause of prize but the court of the place or country to which the prize was carried. But here the vessel was carried to a *Spanish* country, and condemned in a *French court*.

This Court has an undoubted right to examine into the competency of the court whose sentence is produced in evidence. That question was decided in the case of *Glass* v. *Gibbs*, (*The Betsey*,) 3 *Dall.* 7. and if not competent, this court will disregard its sentence.

Sir W. Scott, in a great number of cases, has looked into the question of the competency and jurisdiction of the court, and inquired whether the court proceeded according to the law of nations. 1 *Rob.* 142. *The Flad Oyen.* 8 *T. R.* 270. *Havilock* v. *Rockwood*, and 2 *Rob.* 172. *The Christopher.*

In the case of *Sheafe & Turner* v. *A parcel of sugars, in the circuit court of South Carolina, in* 1800, the sugars, it is said, were carried into a Spanish port and condemned in a French port; but Spain was then an ally of France, and the capture was *jure belli.*

When it is said that a neutral court has no cognizance of prize, it means that a neutral court cannot interfere between *belligerents*, but not that a neutral court shall not interfere between a belligerent and one of its own neutral citizens. 3 *Rob.* 82. *The Kierlighett.* 2 *Rob.* 239. *The Perseverance.* Of what use is a treaty, if a sen-

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tence contrary to that treaty is to be respected by the nation whose rights are thereby violated? In *Mayne* v. *Walter*, *Park*, 414. *Pollard* v. *Bett*, 8 *T. R.* 437. and *Bird* v. *Appleton*, 8 *T. R.* 562. it is decided that a condemnation grounded upon an arbitrary arrete is void. *Browne* (*Civ. Law*, *vol.* 2. *p.* 332.) says, that where the proceeding is *in rem*, it must be where the *thing* is. The powers of *condemnation* and of *restoration* belong to the same court. It must have the possession of the thing in order to restore it.

The court is said to proceed *instanter*, *velo levato*. If the court of Santo Domingo had decreed restitution, it could not have enforced its decree. In the case of the *Henrick and Maria*, 4 *Rob.* 52. Sir William Scott, while he acknowledges that the English practice has been to condemn vessels lying in a *neutral* port, seems to express a wish that the superior court would *recall* the practice *to the proper purity of the principle*. In p. 46. he says, that "upon principle it is not to be asserted that a ship, brought into a *neutral* port, is, with effect, proceeded against in the *belligerent* country. The *res ipsa*, the *corpus*, is not within the possession of the court; and *possession*, *in such cases*, *founds jurisdiction*."

It was upon this *pure* principle that the 22d article of the French convention was founded. It is no argument to say that the courts of each nation must have an equal right to expound that convention, and that if we think their construction incorrect, we must apply to government for redress. If application were to be made to government, we should be sent back again to our courts of law; and not until it should be there pronounced that the French construction was incorrect, would our government make application to that of France for redress. In case of rescue or escape, the government is never bound to restore. The capturing nation takes redress in its own way, and by its own strength, and cannot require the aid of our arm. The penal laws of a foreign country can affect only the property in its power, (1 *H. Bl.* 134, 135.) and cannot be executed by the courts of another. 2 *Wash.* 295. 298. Municipal law cannot make prize of war. 2 *Dall.* 4. 3 *Dall.* 77.

and if the thing be not within the jurisdiction of the court, it cannot proceed. 3 *Dall.* 86. It must at least be in the country of the captor or of his ally. 2 *Browne's Civ. Law*, 268.

No property can be acquired by capture, unless it be carried *infra præsidia*, *i. e.* into the ports of the enemy of the captured; and according to *Lee*, the ports of an ally will not answer. *Lee on Captures*, 87. to 96. A capture cannot give a title, unless it be of enemy's property. 2 *Dall.* 2. 34. The case of *Wheelwright* v. *Depeyster*, 1 *Johnson*, 471. was in all its circumstances exactly like the present, and the supreme court of New-York decided the court at Santo Domingo to be incompetent to condemn a vessel lying at *St. Jago de Cuba*. Spain was not an ally in the war. She professed to be neutral, and was bound to neutral duties. (See her own declaration to her subjects, dated the 10th of September, 1804, and her manifesto and declaration of war of 10th of December, 1804, in the New Annual Register of that year.) Although there was a treaty of alliance between her and France, yet by the terms of that treaty Spain was not bound to assist France until called upon; and France had not then demanded her aid. She was therefore neutral, and was bound to refrain from giving any direct aid to either of the belligerents. But to allow one belligerent to carry prizes into her ports, and deposit them there for safe keeping, is a violation of neutrality—it is a direct aid. Spain did wrong to permit this kind of deposit, and therefore no right can be derived from it. It is not always necessary to make application to government for redress by negotiation or war. If the title derived from the captor be bad, and the thing is brought within the jurisdiction of our courts, it is competent for those courts to give redress, and restore the thing to its lawful owner. But when a neutral becomes an ally, she is no longer bound to perform these *neutral* duties, she becomes a partner in the war, and is bound to *belligerent* duties. She is bound to give her aid to her co-belligerent. The exception of the country of an ally, therefore, strengthens the general rule, that the property cannot be lawfully condemned while lying in a neutral country.

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The possession of one ally is *quoad hoc* the possession of the other.

Proceedings for forfeitures are always proceedings *in rem*; and to make them valid, it is always necessary that the court should have possession of the *thing*. Possession is the foundation of all its proceedings. How can it condemn what is not in its power to give? Or how restore what is not within its controul? This principle applies as universally to captures *jure belli*, as to seizures for municipal offences. If this be a municipal seizure, it is immaterial whether Spain was an ally in the war or not; because she could not be an ally as to municipal offences. One ally never gives up offenders against the municipal laws of the other, unless bound so to do by treaty. One ally is not bound to aid the other in maintaining the authority of its own laws. So if property be carried to the country of one ally, the laws of the other cannot reach it. The former is not bound to give it up to the latter, nor to enforce its municipal judgments or decrees.

The arrete of 2d October, 1802, gives the jurisdiction only to "the ordinary tribunal of the *place where the prize shall have been conducted*;" so that by the *lex loci* the court at Santo Domingo had no jurisdiction, even if the vessel had laid at another French port.

Captors gain no right by mere capture. Whatever is required *jure belli*, belongs to the sovereign. No title is gained until condemnation. 3 *Rob.* 193. France herself, when neutral, will not permit a belligerent to detain his prize in her ports more than 24 hours. 2 *Azuni*, 256. A man can sell only what he has. But the captor, before condemnation, had at most a right of possession. The right is said to be in abeyance, subject to the chance of recapture, and to the *jus postliminii*. If it be said that *jus postliminii* does not apply to neutrals, we say, that when a belligerent treats a neutral as an enemy, the latter becomes entitled to belligerent rights. If rescued, what becomes of the right aequired by capture? There is no instance of a condemnation after such a rescue, nor of a complaint to

the government of the neutral. The rule in all cases of sale of captured goods is, *caveat emptor.*

On the part of the respondent (*the purchaser under the sale at Barracoa.*) it was admitted that there were only two questions in the case, viz.

1. Whether the vessel was seized *jure belli*, or in execution of municipal laws?

2. Whether the condemnation by a court in Santo Domingo, while the vessel was in a Spanish port, was a legal condemnation?

1. The condemnation was in exercise of belligerent rights, and not for violation of a municipal law.

England, during the contest with these states, always claimed and exercised the rights of war. France never complained, even before she became a party. So France is to be considered as a belligerent with respect to *Hayti.* There were armies on both sides, arrayed against each other, fighting battles, taking towns, and carrying on a war in fact. It was not a trifling and partial insurrection, but a most cruel and bloody war. It was a *civil*, or rather a *servile* war, but not to be distinguished from other wars as to belligerent rights. The non-intercourse act passed by congress in 1798 or 1799, if it had stood alone, might have been considered as a municipal regulation; but connected with other facts, it was taken by this court to be an act of the partial war then waging against France. So the act of the British parliament, in 1776, prohibiting all trade with the North American colonies, was an act of war. The word *war* was not used, because England, as a matter of punctilio, would not acknowledge us as an independent nation. This court said we were at war with France in 1798, but congress did not say so; and France always denied it. So the Netherlands were at war with Spain for 70 years, but Spain would never acknowledge it.

If there was war between France and Hayti, the *arrete* seems clearly to be a war-measure, an exercise of

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belligerent rights. Its only object was the annoyance of the enemy. There are many acts which, if considered alone, might appear equivocal whether intended as measures of peace or of war, and can only be explained by concomitant circumstances. Municipal rights may be brought in aid of belligerent rights, and when hostilities are actually existing, an act which might be done in time of peace may be considered as a measure of war.*

* In answer to a question from the court, Mr. *Duponceau* observed as follows, viz.

The question is, whether France can, by the mere force of the law of nations, seize and confiscate vessels of neutral nations trading to Hayti.

If it is admitted that the situation of France with Hayti is a war, it follows, that France is at war, and we are neutrals.

If neutrals, we cannot judge of any thing as *de jure* which is the subject of the controversy between France and Hayti.

Hayti contends that *de jure* she is an independent state.

France contends that *de jure* Hayti is her dependent colony.

Of this, as neutrals, we are not permitted to judge.† We find them at war together, and at issue on this question of *dependent* or *independent*; we must take them both to be right.

We cannot, therefore, acknowledge the right of France to make and enforce *municipal* regulations for Hayti; it would be acknowledging the sovereignty of France over Hayti, and thus deciding the question between them, which we are not permitted to do as neutrals.

Nor can we permit our subjects to trade with Hayti, contrary to the prohibition of France, for that would be acknowledging the independence of Hayti, and as such would be a violation of our neutrality, by deciding in favour of one side the very question in controversy between them.

But it will be said, that if we consider France merely as a power at war with Hayti, she has no right to prohibit our trading with them, as one nation at war cannot forbid neutrals to trade with its enemy, except in contraband articles.

† 3 *Vat*, § 188. *Ibid.* § 190. 2 *Azuni*, 63, &c. *Hubner.*

It is not necessary that a prize court should be a court of admiralty. Prizes are sometimes condemned in a tribunal of commerce. 2 *Azuni*, 262. 3 *Bos. and Pul.*

This is true in the case of a war between independent states, but this war is of a different character, and produces different effects.

It is a principle of the law of nations, that in war both belligerents and neutrals have a right, with respect to each other, to do all that they had a right to do in time of peace, and immediately before the war, but no more.‡

But in time of peace France prohibited other nations from trading with Hayti; that is, she prohibited them if she thought proper; in war she must continue to have the same right for the above reason, and because denying it to her would be judging the question in controversy between her and Hayti, which we have no right to do.

True, France claims it as a municipal right; it is the only object of her going to war; but she claims it of the Haytians, not of us, and if she did, we cannot concede it to her *as such*; we cannot grant her the right of binding the inhabitants of Hayti, or preventing *them* from trading with us; that we have nothing to do with; it is the question *between them* which we are not to decide; but we must grant to her the right of binding us, and preventing us from trading with Hayti, not as a municipal right, which right our neutrality prevents us from acknowledging, but as a belligerent right which she has to prevent us from interfering by our overt acts in the question of *dependence* or *independence* between her and the people of Hayti.

If she has the right to prevent us from interfering in that manner, she has incontestibly by the law of nations the right of punishing that interference by the seizure and condemnation of our ships and goods found in contravention.

France then claims two sorts of rights, municipal and belligerent; but the former claim is only between her and Hayti, and that we have nothing to do with; the latter is between her and all the world, and those we are bound to notice.

From her claim of those two concurrent rights, she, as Britain did in our revolutionary war, clothes her prohibitions in the shape of municipal regulations, thereby pretending to assert her claim of jurisdiction over her revolted subjects; that form she adopts for the sake of her national dignity; but we, who are not bound to support that dignity, recognize her rights only so far as they are sanctioned by the laws of a war of the nature of that in which she is engaged, and no further; and they do not bind us further than the laws

‡ The prohibitions of England respecting the colonial trade of her enemies are founded on this principle, and carried to a degree of rigour which it does not seem to warrant.

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526. But this was a court of admiralty. It was founded upon the model of the council of prizes at Paris. It is no part of the ordinary judicature; it is a political institution, established by a special commission from the government, to decide, in an *executive* capacity, on the validity of maritime captures. 2 *Azuni*, 268. 2 *New Code des Prises*, 1070. *Arrete of 18th June*, 1802.

2. The condemnation of the vessel was valid, although lying in a neutral country.

The correctness of such condemnations is questioned on the single dictum of Sir W. Scott. When in the *Flad Oyen*, 1 *Rob.* 119, 120. he said that there were only two cases of ships carried into foreign ports and condemned in England, he was not candid; he knew there were more than two such cases. And in 4 *Rob.* 52. *the Henrick and Maria*, he admits that the practice is *too inveterate* to be altered, and shows that the practice has been adopted or sanctioned by fourteen out of eighteen states in Europe. England adopted it as long ago as 1695. (4 *Rob.* 40.) In 1 *Wilson*, 191. as early as 1745, it was mentioned without exciting any astonishment; and in 4 *Rob.* 50. Sir *W. Scott* himself admits it was the practice in the wars of 1739, 1745, 1756, 1776, and 1793. France began it in 1705, and has continued it to this day. Sir W. Scott was mistaken in saying that the editor of the *New Code des Prises* speaks of it as an innovation. 1 *New Code des Prises*, 357. Russia adopted it in 1787, or perhaps earlier, and Spain during the last war, and probably before. It appears by 4 *Rob.*

of war, applied to the particular war existing, expressly authorise, but they bind us so far.

It may be said that as France claims the right of sovereignty over Hayti, she cannot complain of us if we should allow her that right, though we are not bound to do it as neutrals It is answered, that she indeed claims that right, but she claims it of the subjects of Hayti, and not of us; those which she claims of us are those of a belligerent; she knows that she cannot claim any other of a neutral state, which has nothing to do with her quarrel; and she would have a right to complain of our adding insult to injury, if we were to allow her a right which she does not claim of us, by way of reason or pretext for denying her one which she actually, and we think justly, claims.

50. that it was tolerated by *Portugal*, *Tuscany*, *Naples*, *Sicily*, *the Pope*, *Genoa*, *Sardinia*, *Venice* and *Denmark*. We do not find a contrary practice in the remaining states of Europe, *Holland*, *Sweden*, *Prussia* and *Austria*. We do not know what their practice is, but none of them have complained. It has therefore become the usage of nations; and congress, in the year 1781, by their resolve, declared the United States to be bound by the usage of nations. The practice is also approved by *Galliani*, in his treatise on the duties of nations and princes towards each other, *p.* 443. by *Azuni*, 2 *Az.* 326. and by *Lampredi*, on the commerce of neutrals in time of war, *p.* 192. The quotation from Lampredi, in *Wheelwright* v. *Depeyster*, 1 *Johnson*, 481. is incorrect; it makes him speak a language different from his sentiments. 2 *Az.* 254, 255.

The inconveniences of the contrary practice would be very great. If the captors are obliged to carry the prize a great way out of her course for adjudication, the risk of the seas is great, and the loss of the voyage inevitable. It will be a temptation to the captors to plunder the vessel and destroy her, and perhaps expose the prisoners to great dangers, by sending them adrift in the boat, or subjecting them to severe imprisonment.

The commissioners of England established at Lisbon and Leghorn had no power to adjudicate or condemn. They could only examine the prisoners on oath, and in certain cases restore the property captured.

In our partial war with France, we carried our prizes into neutral ports; and during the war with Tripoli, our cruizers were authorised by an act of congress to carry their prizes into neutral ports.

The treaty with France cannot be construed strictly. It must be expounded by the law and usage of nations.

There is no reason why the *res ipsa*, the *corpus*, should be within the territory. It is not that which gives jurisdiction.

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The principle which confines jurisdiction of prizes to the courts of the captor, is the right which the sovereign has to inquire into the conduct of his subjects, and to enforce the law of nations. 2 *Rutherford*, 566. Sir W. Scott holds the same doctrine *totidem verbis*. 3 *T. R.* 330. *Smart* v. *Wolff*.

It is but of late that a condemnation has been holden necessary to transfer the property.

3. But Spain was an ally in the war with St. Domingo, although she might not be an ally as to the war with England. The treaty between France and Spain, of August 19th, 1796, created an alliance offensive and defensive as to whatever concerned the mutual advantage of the two nations, and contained a guarantee of the islands.*

* EXTRACT FROM THE NEW ANNUAL REGISTER, 1796, PAGE 167. PUBLIC PAPERS.

Treaty of Alliance, offensive and defensive, between the French Republic and the King of Spain, August 19, 1796.

The Executive Directory of the French Republic, and his Catholic Majesty, the King of Spain, animated by the wish to strengthen the bonds of amity and good understanding happily re-established between France and Spain by the treaty of peace concluded at Basle, on the 4th Thermidor, in the third year of the Republic, (22d July, 1795,) have resolved to form an offensive and defensive treaty of alliance, for whatever *concerns the advantage and common defence* of the two nations; and they have charged with this important negotiation, and have given their full powers to the undermentioned persons, namely: The Executive Directory of the French Republic, to Citizen Dominique Catherine Perignon, General of Division of the Republic, and its Ambassador to his Catholic Majesty, the King of Spain; and his Catholic Majesty, the King of Spain, to his excellency, Don Manuel de Godoi, Prince of Peace, Duke of Alcudia, &c. &c. &c. who, after the respective communication and exchange of their full powers, have agreed on the following articles:

I. There shall exist for ever *an offensive and defensive alliance* between the French Republic and his Catholic Majesty, the King of Spain.

II. The two contracting powers shall be mutual *guarantees, without any reserve or exceptions*, in the *most authentic and absolute way*, of all the states, territories, islands, and other places which they possess, and shall respectively possess. And if one of the two powers shall be in the sequel, *under whatever pretext it may be, menaced or attacked*, the other promises, engages, and binds itself to *help it with*

(*New Annual Register for* 1796, *p.* 167.) When one part of the the nation separates from the other, and seeks to maintain its independence by force of arms, a war subsists *de facto*, and the *casus fœderis* has arisen. The

its good offices, and to *succour it on its requisition as shall be stipulated in the following articles.*

III. Within the space of three months, reckoning from the moment of the *requisition*, the power called on shall hold in readiness, and place in the disposal of the power calling, fifteen ships of the line, three of which shall be three deckers, or of 80 guns, and twelve from 70 to 74; six frigates of a proportionate force, and four sloops or light vessels, all equipped, armed and victualled for six months, and stored for a year. These naval forces shall be assembled by the power called on, in the particular port pointed out by the power calling.

IV. In case the requiring power may have judged it proper for the commencement of hostilities to confine to the one half the succour which was to have been given in execution of the preceding article, it may, at any epoch of the campaign, call for the other half of the aforesaid succour, which shall be furnished in the mode and within the space fixed, this space of time to be reckoned from the new requisition.

V. The power called on shall in the same way place at the disposal of the requiring power, within the space of three months, reckoning from the moment of the requisition, eighteen thousand infantry and six thousand cavalry, with a proportionate train of artillery, ready to be employed in Europe, and for the defence of the colonies which the contracting powers possess in the Gulf of Mexico.

VI. The requiring power shall be allowed to send one or several commissioners, for the purpose of assuring itself whether, conformably to the preceding articles, the power called on has put itself in a state to commence hostilities on the day fixed with the land and sea forces.

VII. These succours shall be entirely placed at the disposal of the requiring power, which may have them in the ports and on the territory of the power called on, or employ them in expeditions it may think fit to undertake, *without being obliged to give an account of the motives by which it may have been determined.*

VIII. The demand of the succours stipulated in the preceding articles, made by one of the powers, shall suffice to prove the need it has of them, without its being necessary to enter into any discussion relative to the question, whether the war it proposes be offensive or defensive, *or without any explanation being required*, which may tend to elude the most speedy and exact accomplishment of what is stipulated.

IX. The troops and ships demanded shall continue at the disposal of the requiring power during the whole continuance of the war,

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guarantee of the islands was against all men, traitors as well as enemies. The revolt of the negroes was a matter which concerned both nations. It was equally the interest of both that they should be suppressed.

without its incurring in any case any expense. The power called on shall maintain them in all places where its ally shall cause them to act, as if it employed them directly for itself. It is simply agreed on, that, during the whole of the time when the aforesaid troops or ships shall be on the territory or in the ports of the requiring power, it shall furnish from its magazines or arsenals whatever may be necessary to them, in the same way and at the same price as it supplies its own troops and ships.

X. The power called on shall immediately replace the ships it furnishes, which may be lost by accidents of war or of the sea. It shall also repair the losses the troops it supplies may suffer.

XI. If the aforesaid succours are found to be, or should become insufficient, the two contracting powers shall put on foot the greatest forces they possibly can, as well by sea as by land, against the enemy of the power attacked, which shall employ the aforesaid forces either by combining them or by causing them to act separately, and this conformably to a plan concerted between them.

XII. The succours stipulated by the preceding articles shall be furnished *in all the wars* the contracting powers may have to maintain, even in those in which the party called on may not be directly interested, and may act merely as a simple auxiliary.

XIII. In the case in which the motives of hostilities being prejudicial to both parties, they may declare war with one common assent against one or several powers, the limitations established in the preceding articles shall cease to take place, and the two contracting powers shall be bound to bring into action against the common enemy the whole of their land and sea forces, and to concert their plans so as to direct them towards the most convenient points, either separately or by uniting them. They equally bind themselves, in the cases pointed out in the present article, not to treat for peace unless with one common consent, and in such a way as that each shall obtain the satisfaction which is its due.

XIV. In the case in which one of the powers shall act merely as an auxiliary, the power which alone shall find itself attacked may treat of peace separately, but so as that no prejudice may result from thence to the auxiliary power, and that it may even turn as much as possible to its direct advantage. For this purpose advice shall be given to the auxiliary power of the mode and time agreed on for the opening and sequel of the negotiations.

XV. Without any delay there shall be concluded a treaty of commerce on the most equitable basis, and reciprocally advantageous to the two nations, which shall secure to each of them with its ally a marked preference for the productions of its soil or manufactures, or at least advantages equal to those which the most favoured nations

The trading with the revolted slaves was in itself a violation of the law of nations. It is immaterial whether it be a violation of a municipal law, or of the rights of war. A vessel may be lawfully seized and condemn-

enjoy in their respective states. The two powers engage to make instantly a common cause to repress and annihilate the maxims adopted by any country whatever, which may be subversive of their present principles, and which may bring into danger the safety of the neutral flag, and the respect which is due to it, as well as to raise and re-establish the colonial system of Spain on the footing on which it has subsisted, or ought to subsist, conformably to treaties.

XVI. The character and jurisdiction of the consuls shall be at the same time recognized and regulated by a particular convention. The conventions anterior to the present treaty shall be provisionally executed.

XVII. To avoid every dispute between the two powers, they shall be bound to employ themselves immediately, and without delay, in the explanation and developement of the 7th article of the treaty of Basle, concerning the frontiers, conformable to the instructions, plans and memoirs which shall be communicated through the medium of the plenipotentiaries who negotiate the present treaty.

XVIII. England being the only power against which Spain has direct grievances, the present alliance shall not be executed unless against her during the present war, and Spain shall remain neuter with respect to the other powers armed against the republic.

XIX. The ratifications of the present treaty shall be exchanged within a month from the date of its being signed.

Done at St. Ildephonso, 2d Fructidor, (August 19,) the 4th year of the French Republic, one and indivisible.

(Signed) PERIGNON, and the PRINCE OF PEACE.

The Executive Directory resolves on and signs the present offensive and defensive treaty of alliance with his Catholic Majesty, the King of Spain, negotiated in the name of the French Republic by Citizen Dominique Catherine Perignon, General of Division, founded on powers to that effect by a resolution of the Executive Directory, dated 20th Messidor, (September 6,) and charged with its instructions.

Done at the National Palace of the Executive Directory, the 4th year of the French Republic, one and indivisible.

Conformable to the original,
(Signed) REVEILLIERE LEPAUX, President.

By the Executive Directory,
LAGARDE, Secretaire General.

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ed as prize for a violation of the law of nations, whether there be war or not. A French prize court does not come into existence nor cease with a war, but, like our district courts, always exists as a prize court.

The arretes of Le Clerc, Ferrand, &c. were mere proclamations; not laws, but declarations of what the law was before. The vessel was as liable to seizure after she had got out of the territorial jurisdiction, as if she had violated a blockade.

Whether it be a case of prize of war or of municipal cognizance, the court had a right to order a sale before condemnation, and a purchaser under such sale gained a good title against all the world. The sale was made under the order of the court by its authorised agent.

The communications of the French ministers *Pichon* and *Turreau* to our government, consider this trade as a violation of the law of nations, and our government has considered it in the same light. If it was only a violation of the municipal law of France, this country must have been prostrated *in dust and ashes*, when congress passed a law to carry into effect the municipal law of France. But the truth is, that if this government had not put a stop to the trade, it would have sanctioned a violation of the law of nations.

In the Baltimore case, the court ought to have left the jury to decide, under all the circumstances of the case, whether the brigands had such a title to the property as to make a valid sale to the plaintiffs. The purchase was made only a few months after the slaves had driven out or murdered all the whites, and had confiscated their property. The probability is, that this very property was the property of the whites, obtained by plunder and robbery. If so, the robbers gained no title. It was, therefore, a matter of fact for the jury to decide.

But the principal question, whether a French court can condemn a prize lying in a neutral port, is to be determined, not by adjudged cases in one nation only, but by the law and practice of the civilized maritime

nations of Europe. It has been shown to be the practice of most, if not of all the maritime nations of Europe for a century; and if *we* have no practice on the subject, and are now called upon to establish one, it will certainly be our interest to conform to that of Europe.

This is a civil war of the most odious kind—slaves against their masters. It is said, indeed, that they were free. But the same power which had declared them free, had since declared them to be *slaves*. But whether they are to be considered as free rebels, or as revolted slaves, *we* had no right to trade with them.

There are duties which one state owes to another in the case of rebellion. If a nation joins or assists the rebels, it becomes an enemy. Upon this point, authorities are not necessary. Reason alone is sufficient. The United States have never acknowledged the independence of Hayti; and the citizens of the United States have no right to consider it as an independent nation.

A law of a nation regulating the trade of foreigners in the territory of that nation, is not a municipal law, but a modification of the law of nations. By the law of nations, every state has a right to regulate the trade of foreigners with that state, and every such regulation is only a modification of that law.

To succour rebels is as much a violation of the law of nations, as to succour a blockaded port, or a besieged city.

A prize may be condemned while lying in a neutral port, or at the bottom of the sea, or even if the thing be consumed.

The condemnation does not give property; it only establishes the fact that the captor or his sovereign had a lawful title by the capture. 1 *Wilson*, 211. 2 *Azuni*, 262. 12 *Mod.* 134. *Rex* v. *Broom*. *Carthew*, 398. *S. C.*

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The owner of goods captured can only resort to the courts of the captor for redress. *Doug.* 614. *Le Caux* v. *Eden.* No other nation can interfere. He has no right to apply to the courts of his own country, even if his goods are carried there. Neutrals cannot interfere; if they do, they make themselves parties in the war.

The treaty of alliance bound Spain to assist France against the revolted slaves. *Vattel* (*p.* 234. *b.* 2. *s.* 197.) says, "An ally ought doubtless to be defended against *every invasion*, against every foreign violence, *and even against his rebellious subjects.*" A Spanish port was therefore to be considered as a port of an ally.

A neutral, whose property has been seized for violation of the law of nations, has no right to rescue it. He may escape with it if he can; but there is no *jus postliminii* in favour of neutrals.*

The court at Santo Domingo was the sole judge of its own jurisdiction. Its decision upon that point is conclusive upon this court.

The questions of *jus postliminii*, and *infra præsidia*, and of 24 hours possession, can only arise in a case

*MARSHALL, Ch. J. Do you contend that, after its escape, the captor may proceed to libel and condemn the property in the courts of the captor?

Martin. Unquestionably. The property vests by the capture.

JOHNSON, J. Is not a neutral vessel, captured as prize for a breach of the law of nations, *quoad hoc* an enemy, and as much entitled to rescue herself as an open enemy?

Martin. No. The offended nation would have a right to demand that she be given up by her government; and if it refuses, it sanctions the inimical act of its subject, and makes itself a party in the war. So if the seizure be for violation of a municipal law, the government of France has a vested right; but not if there be no seizure. If an American neutral vessel, not having a commission therefor, should assist in rescuing another neutral American vessel from a belligerent who had seized her as prize for violation of the law of nations, she would be guilty of piracy.

between the recaptor and the first owner, or between the latter and a vendee of the captor. As between the captor and the captured, the title passes by the seizure. A condemnation is only *evidence* of the lawfulness of the seizure. But it is not the only evidence. This doctrine is acknowledged by all the nations of Europe, except England. But England cannot make the law of nations. *Grotius*, *p.* 580, 581. *b.* 3. *c.* 6. *s.* 2. *and* 3. *tit.* 4. *Vattel*, *p.* 570. *b.* 3. *s.* 195, 196. 212. *p.* 585. *Burlemaqui*, (*last part*,) *p.* 222. *s.* 13. *and* 14. *Lee on Captures*, 68, 69, 70. 73. 76. 101, 102. *Jus postliminii* does not arise with regard to moveable goods, except ships; but a belligerent acquires the right to immoveable things, immediately upon capture. 1 *Emerigon*, 4*to ed.* (*French*,) *p.* 513. 2 *Azuni*, 236. 238. *Lee on Captures*, *p.* 64. *c.* 5. 1 *Rob.* 114. The reason of a distinction being taken between ships and other moveables, is, that the identity and title of a ship may be as certainly traced as that of land; and there is the same reason for the rule *caveat emptor*.

If the title to all foreign merchandize is to be thus questioned, it will be necessary to trace it up in all instances, to the original manufacturer, or to the cultivator of the soil. No purchaser will be safe. Such are not the principles of the common law.

A sale under a *fieri facias* is good, although the judgment be afterwards reversed. 3 *Bl. Com.* 448, 449. So in Maryland, although the statute forbids an administrator to sell the slaves of his intestate, if there be sufficient other personal estate to pay the debts, yet if in violation of that law he sells the slaves, the title of the purchaser is good.

Even a municipal seizure vests the title in the government. 5 *Mod.* 193. *Roberts* v. *Withered*. *Comb.* 361. 12 *Mod.* 92. 5 *T. R.* 112. 117. *Wilkins* v. *Despard*.

But the purchaser, at all events, is entitled to salvage. While the property was in the hands of the captor, it was totally lost to the owner, who ought at all events to repay to the purchaser his purchase money, with in-

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terest, and the expense of transportation to this country.

March 2.

MARSHALL, Ch. J. delivered the opinion of the court.

This is a claim for a cargo of coffee, &c. which, after being shipped from a port in *Santo Domingo*, in possession of the *brigands*, was captured by a French privateer, and carried into *Barracoa*, a small port in the island of *Cuba*, where it was sold by the captor. The cargo, having been brought by the purchaser into the state of South Carolina, was libelled in the court of admiralty, by the original American owner. The purchaser defends his title by a sentence of condemnation pronounced by a tribunal sitting in *Santo Domingo*, after the property had been libelled in the court of *this* country; and by an order of sale made by a person styling himself delegate of the French government of Santo Domingo at *St. Jago de Cuba.*

The great question to be decided is,

Was this sentence pronounced by a court of competent jurisdiction?

At the threshold of this interesting inquiry, a difficulty presents itself, which is of no inconsiderable magnitude. It is this.

Can this court examine the jurisdiction of a foreign tribunal?

The court pronouncing the sentence, of necessity decided in favour of its jurisdiction; and if the decision was erroneous, that error, it is said, ought to be corrected by the superior tribunals of its own country, not by those of a foreign country.

This proposition certainly cannot be admitted in its full extent. A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-

constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever.

The power of the court then is, of necessity, examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power, under which it acts, must be looked into; and its authority to decide questions, which it professes to decide, must be considered.

But although the general power by which a court takes jurisdiction of causes must be inspected, in order to determine whether it may rightfully do what it professes to do, it is still a question of serious difficulty, whether the situation of the particular thing on which the sentence has passed, may be inquired into, for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction of the court passing the sentence. For example; in every case of a foreign sentence condemning a vessel as prize of war, the authority of the tribunal to act as a prize court must be examinable. Is the question, whether the vessel condemned was in a situation to subject her to the jurisdiction of that court, also examinable? This question, in the opinion of the court, must be answered in the affirmative.

Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or in other words, on its jurisdiction over the subject-matter which it has determined. In some cases, that jurisdiction unquestionably depends as well on the state of the thing, as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within, or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence.

Passing from principle to authority, we find, that in the courts of England, whose decisions are particularly mentioned, because we are best acquainted with them, and because, as is believed, they give to foreign sentences as full effect as are given to them in any part of the civilized world, the position that the sentence of a foreign court is conclusive with respect to what it professes to decide, is uniformly qualified with the limitation that it has, in the given case, jurisdiction of the subject-matter.

This general *dictum* is explained by particular cases.

The case of the *Flad Oyen*, 1 *Rob.* 114. was a vessel condemned by a belligerent court sitting in a neutral territory; consequently, the objection to that sentence turned entirely on the defect in the constitution of the court.

The Christopher, 2 *Rob.* 173. was condemned while lying in the port of an ally. The jurisdiction of the court passing the sentence was affirmed, but no doubt seems to have been entertained, at the bar, or by the judge himself, of his right to decide the question, whether a court of admiralty sitting in the country of the captor could take jurisdiction of a prize lying in the port of an ally. The decision of the tribunal at *Bayonne* in favour of its own jurisdiction, was not considered as conclusive on the court of admiralty in England, but that question was considered as being perfectly open, and as depending on the law of nations.

The case of *The Kierlighett*, 3 *Rob.* 82. is of the same description with that of *The Christopher*, and establishes the same principle.

In the case of *The Henrick and Maria*, 4 *Rob.* 35. *Sir W. Scott* determined that a condemnation, by the court of the captor, of a vessel lying in a *neutral* port, was conformable to the practice of nations, and therefore valid; but in that case the right to inquire whether the situation of the thing, the *locus in quo*, did not take it out of the jurisdiction of the court, was considered as unquestionable.

The case of *The Comet*, 5 *Rob.* 255. stands on the same principles.

The Helena, 4 *Rob.* 3. was a British vessel captured by an Algerine corsair owned by the Dey, and transferred to a Spanish purchaser by a public act in solemn manner before the Spanish consul. The transfer was guarantied by the Dey himself. The vessel was again transferred to a British purchaser under the public sanction of the judge of the vice-admiralty court of Minorca, after that place had surrendered to the British arms. On a claim in the court of admiralty by the original British owner, Sir W. Scott affirmed the title of the purchaser, but expressed no doubt of the right of the court to investigate the subject.

The manner in which this subject is understood in the courts of England, may then be considered as established on uncontrovertible authority. Although no case has been found in which the validity of a foreign sentence has been denied, because the thing was not within the ports of the captor, yet it is apparent that the courts of that country hold themselves warranted in examining the jurisdiction of a foreign court, by which a sentence of condemnation has passed, not only in relation to the constitutional powers of the court, but also in relation to the situation of the thing on which those powers are exercised; at least so far as the right of the foreign court to take jurisdiction of the thing is regulated by the law of nations and by treaties. There is no reason to suppose that the tribunals of any other country whatever deny themselves the same power. It is, therefore, at present, considered as the uniform practice of civilized nations, and is adopted by this court as the true principle which ought to govern in this case.

In pursuing the inquiry, then, whether the tribunal erected in *St. Domingo* was acting on a case of which it had jurisdiction when *The Sarah* was condemned, this court will examine the constitutional powers of that tribunal, the character in which it acted, and the situation of the subject *on* which it acted.

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Admitting that the ordinary tribunal erected in *St. Domingo* was capable of acting as a prize court, and also of taking cognizance of offences against regulations purely municipal, it is material to inquire in which character it pronounced the sentence of condemnation in the case now under consideration.

In making this inquiry, the relative situation of *St. Domingo* and France must necessarily be considered.

The colony of *St. Domingo* originally belonging to France, had broken the bond which connected her with the parent state, had declared herself *independent*, and was endeavouring to support that independence by arms. France still asserted her claim of sovereignty, and had employed a military force in support of that claim. A war *de facto* then unquestionably existed between France and *St. Domingo*. It has been argued that the colony, having declared itself a sovereign state, and having thus far maintained its sovereignty by arms, must be considered and treated by other nations as sovereign in fact, and as being entitled to maintain the same intercourse with the world that is maintained by other belligerent nations. In support of this argument, the doctrines of *Vattel* have been particularly referred to. But the language of that writer is obviously addressed to sovereigns, not to *courts*. It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting.

It is not intended to say that belligerent rights may not be superadded to those of sovereignty. But admitting a sovereign who is endeavouring to reduce his revolted subjects to obedience, to possess both sovereign and belligerent rights, and to be capable of acting in either character, the manner in which he acts must determine the character of the act. If as a legislator he publishes a law ordaining punishments for certain offences, which law is to be applied by courts, the nature of the law, and of the proceedings under it, will

decide whether it is an exercise of belligerent rights, or exclusively of his sovereign power; and whether the court, in applying this law to particular cases, acts as a prize court, or as a court enforcing municipal regulations.

Let the acts of the French government which relate to this subject be inspected.

The notification given by Mr. *Pichon*, the French *charge d'affaires* to the American government, which was published in March, 1802, interdicts all manner of intercourse with the ports of *St. Domingo*, in possession of the revolted negroes, and declares that "cruisers will arrest all foreign vessels *attempting* to enter any other port, and to communicate with any of the revolted negroes, to carry either ammunition or provisions to them. Such vessels," he adds, "shall be confiscated, and the commanders severely punished, as violating the rights of the French Republic, and the law of nations."

It might be questioned, under this notice, whether vessels sailing on the high seas, having traded with one of the brigand ports, would be considered as liable to seizure and to confiscation, after passing the territorial jurisdiction of the government of *St. Domingo*. A free trade with that colony had been allowed, and the revocation of that license is made known to the government of the United States. To its revocation the ordinary rights of sovereignty alone were sufficient. The notification, however, refers to the order of the commander in chief of the French Republic in *St. Domingo*; and that order would of course be examined as exhibiting more perfectly the extent and the nature of the rights which the French Republic purposed to exercise.

The particular order which preceded this notification is in these words: "Every vessel, French or foreign, which shall be found by the vessels of the Republic riding at anchor in the ports of the island not designated by these presents, or within the bays, creeks, and landing places on the coast, or under sail at a less distance

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than two leagues from the coast, and communicating with the land, shall be forfeited."

The next decree is dated the 22d of June, 1802, and the extract which is supposed to regulate this particular subject, is in these words: "Every vessel, French or foreign, which shall be found by the vessels of the Republic anchored in one of the ports of the island, not designated by the present decree, or in the bays, coves, or landings of the coast, or under sail at a less distance than two leagues from the coast, and communicating with the land, shall be arrested and confiscated."

Nothing can be more obvious than that these are strictly territorial regulations, proceeding from the sovereign power of St. Domingo, and intended to enforce sovereign rights. Seizure for a breach of this law is to be made only within those limits over which the sovereign claimed a right to legislate, in virtue of that exclusive dominion which every nation possesses within its own territory, and within such a distance from the land as may be considered as a part of its territory. This power is the same in peace and in war, and is exercised according to the discretion of the sovereign. The prohibition and the penalty are the same on French and foreign vessels.

This subject was again taken up in October, 1802, in an *arrete*, which in part regulates the coasting trade of the island. The 4th, 5th and 6th articles of this decree respect foreign as well as French vessels, and subject them to confiscation in the cases which are there enumerated.

These are all of the same description with those stated in the *arrete* of the 22d of June; and no seizure is authorised but of vessels found within two leagues of the coast.

The last decree is that which was issued by *General Ferrand* on the 1st of March, 1804. This deserves the more attention, because it is that on which the courts profess to found their sentence of condemnation, in the particular case under consideration, and because *General*

Ferrand uses expressions which clearly indicate the point of view in which all these *arretes* were contemplated by the government of the island.

The title of this *arrete* is, " An *arrete* relative to vessels taken in contravention of the dispositions of the laws and regulations concerning French and foreign commerce in the colony."

In stating the motives for this ordinance, it is said, " That some French agents in the neighbouring and allied islands had mistaken the application of the laws and regulations concerning vessels taken in contravention, upon the coasts of St. Domingo occupied by the rebels, and had confounded those prizes with those which were made upon the enemy of the state." " Desiring to put an end to all the abuses which might result from this mistake, and which would be as injurious to the territorial sovereignty as to the rights of neutrality," the commander in chief, after some further recitals, which are not deemed material, ordains the law under which the tribunals have proceeded.

The distinction, between seizures made in right of war, and those which are made for infractions of the commercial regulations established by the sovereign power of the state, is here taken *in terms*; and that legislation, which was directed against vessels contravening the laws and regulations concerning French and foreign commerce in the colony, is clearly of the latter description.

The first article of this *ordonnance* is recited in the sentence, as that on which the condemnation is founded. It is in these words:

" The port of Santo Domingo is the only one in the colony of St. Domingo that is open to the French and foreign commerce; in consequence, all vessels anchored in the bays, harbours, and landing places, on the coast occupied by the rebels, those cleared for the ports in their possession coming out with or without a cargo, and, generally, all vessels sailing in the territorial extent of the island, (except that from Cape Raphael to

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Ocoa bay,) found at a distance less than two leagues from the coast, shall be detained by the state vessels and privateers having our letters of marque, who shall conduct them, if possible, into the port of *Santo Domingo*, that the confiscation of the said vessels and cargoes may be pronounced."

As this article authorises a seizure of those vessels only which are "sailing within the territorial extent of the island, found within less than two leagues of the coast," it is deemed by the court to be sufficiently evident that the seizure and confiscation are made in consequence of a violation of municipal regulation, and not in right of war. It is true that the revolt of the colony is the motive for this exercise of sovereign power. Still it is an exercise of sovereign power, restricting itself within those limits which are the province of municipal law, not the exercise of a belligerent right.

The tribunal professing to carry this law into execution, though capable of sitting either as a prize or an instance court, must be considered in this case as acting in the character of an instance court, since it is in that character that it punishes violations of municipal law.

The Sarah was captured more than *ten* leagues from the coast of St. Domingo, was never carried within the jurisdiction of the tribunal of that colony, was sold at Barracoa, in the island of Cuba, and afterwards condemned as prize under the *arrete* of *General Ferrand*, which has been stated.

If the court of St. Domingo had jurisdiction of the case, its sentence is conclusive. If it had no jurisdiction, the proceedings are *coram non judice*, and must be disregarded.

Of its own jurisdiction, so far as depends on municipal rules, the court of a foreign nation must judge, and its decision must be respected. But if it exercises a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from whom the authority is derived, they are not re-

garded by foreign courts. This distinction is taken upon this principle, that the law of nations is the law of all tribunals in the society of nations, and is supposed to be equally understood by all.

Thus the sentence of a court sitting in a neutral territory, and instituted by a belligerent, has been declared not to change the property it professed to condemn; and thus the question whether a prize court sitting in the country of the captor could condemn property lying in a neutral port, has been fully examined, and although the jurisdiction of the court in such case was admitted, yet no doubt appears to have been entertained of the propriety of examining the question, and deciding it according to the practice of nations.

Since courts, who are required to decide whether the condemnation of a vessel and cargo by a foreign tribunal has effected a change of property, may inquire whether the sentence was pronounced by a court which, according to the principles of national law, could have jurisdiction over the subject; this court must inquire whether, in conformity with that law, the tribunal sitting at St. Domingo to punish violations of the municipal laws enacted by its sovereign, could take jurisdiction of a vessel seized on the high seas, for infracting those laws, and carried into a foreign port.

In prosecuting this inquiry, the first question which presents itself to the mind is, what act gives an inchoate jurisdiction to a court?

It cannot be the offence itself. It is repugnant to every idea of a proceeding *in rem*, to act against a thing which is not in the power of the sovereign under whose authority the court proceeds; and no nation will admit that its property should be absolutely changed, while remaining in its own possession, by a sentence which is entirely *ex parte*. Those on board a vessel are supposed to represent all who are interested in it, and if placed in a situation which requires them to take notice of any proceedings against a vessel and cargo, and enables them to assert the rights of the interested, the cause is considered as being properly heard, and all concerned

are parties to it. But the owners of vessels navigating the high seas or lying in port, cannot take notice of any proceedings which may be instituted against those vessels in foreign countries; and consequently, such proceedings would be entirely *ex parte*, and a sentence founded on them never would be, and never ought to be, regarded.

The offence then alleged to have been committed by *The Sarah*, could not be cognizable by the court of St. Domingo, until some other act was performed which should make the owners of the vessel and cargo parties to the proceedings instituted against them, and should place them within the legitimate power of the sovereign, for the infraction of whose laws they were to be confiscated. There must then be a seizure, in order to vest the possession of the thing in the offended sovereign, and enable his courts to proceed against it. This seizure, if made either by a civil officer, or a cruiser acting under the authority of the sovereign, vests the possession in him, and enables him to inquire, by his tribunals constituted for the purpose, into the allegations made against, and in favour of the offending vessel. Those interested in the property which has been seized are considered as parties to this inquiry, and all nations admit that the sentence, whether correct or otherwise, is conclusive.

Will a seizure *de facto*, made without the territorial dominion of the sovereign under cover of whose authority it is made, give a court jurisdiction of a thing never brought within the dominions of that sovereign?

This is a question upon which considerable difficulty has been felt, and on which some contrariety of opinion exists. It has been doubted whether proceedings, denominated judicial, are, in such a case, merely irregular, or are to be considered as absolutely void, being *coram non judice*. If merely irregular, the courts of the country pronouncing the sentence were the exclusive judges of that irregularity, and their decision binds the world; if *coram non judice*, the sentence is as if not pronounced.

It is conceded that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens. It is not easy to conceive a power to execute a municipal law, or to enforce obedience to that law without the circle in which that law operates. A power to seize for the infraction of a law is derived from the sovereign, and must be exercised, it would seem, within those limits which circumscribe the sovereign power. The rights of war may be exercised on the high seas, because war is carried on upon the high seas; but the pacific rights of sovereignty must be exercised within the territory of the sovereign.

If these propositions be true, a seizure of a person not a subject, or of a vessel not belonging to a subject, made on the high seas, for the breach of a municipal regulation, is an act which the sovereign cannot authorise. The person who makes this seizure, then, makes it on a pretext which, if true, will not justify the act, and is a marine trespasser. To a majority of the court it seems to follow, that such a seizure is totally invalid; that the possession, acquired by this unlawful act, is his own possession, not that of the sovereign; and that such possession confers no jurisdiction on the court of the country to which the captor belongs.

This having been the fact in the case of The Sarah, and neither the vessel, nor the captain, supercargo, nor crew, having ever been brought within the jurisdiction of the court, or within the dominion of the sovereign whose laws were infracted, the jurisdiction of the court over the subject of its sentence never attached, the proceedings were entirely *ex parte*, and the sentence is not to be regarded.

The case of The Helena, already cited, may at first view be thought a case which would give validity to any seizure wherever made, and would refer the legality of that seizure solely to the sovereign of the captor. But on a deliberate consideration of that case, the majority of the court is of opinion that this inference is not warranted by it. Several circumstances concurred in pro-

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ducing the decision which was made, and those circumstances vary that case materially from this. The captured vessel was carried into port, and while in the power of the sovereign was transferred by his particular authority in solemn form.

In such a case, Sir W. Scott conceived that a sentence of confiscation conformably with the laws of Algiers, was to be presumed. But his decision did not turn singly on this point. The vessel, after passing in this formal manner to a Spanish purchaser, had, with equal solemnity, been again transferred to a British purchaser; and the judge considered this second purchaser, with how much reason may perhaps be doubted, as in a better situation than the original purchaser. This case is badly reported, the points made by counsel on one side are totally omitted, and the opinion of the judge is not given with that clearness which usually characterizes the opinions of Sir William Scott. But the seizure was presumed to be made by way of reprisals for some breach of the treaty between the two powers, so that the possession of the captor was considered as legitimately the possession of his sovereign, and from the subsequent conduct of the Dey himself, a condemnation according to the usages of Algiers was presumed.

But in presuming a condemnation, this case does not, it is thought, dispense with the necessity of one; nor is it supposed, in presuming a legitimate cause of seizure, to declare that a seizure made without authority, by a commissioned cruiser, would vest the possession in the sovereign of the captor, and give jurisdiction to his courts.

If this case is to be considered as if no sentence of condemnation was ever pronounced, the property is not changed, and this court, having no right to enforce the penal laws of a foreign country, cannot inquire into any infraction of those laws. The property in this particular case was purchased under circumstances which exclude any doubt respecting its identity, and respecting the full knowledge of the purchaser of the nature of the title he acquired.

The sentence of condemnation being considered as null and invalid, the property is unchanged, and therefore ought to be recovered by the libellants in the court below. But those libellants ought to account with the defendants for the freight, insurance, and duties on importation, and for such other expenses as would have been properly chargeable on themselves as importers; and each party is to bear his own costs.

The sentence of the circuit court is to be reversed, and also the sentence of the district court, so far as it contravenes this opinion, and the cause is to be remanded to the circuit court for the district of South Carolina, for a final decision thereon.

Livingston, J. Without expressing an opinion on the invalidity of a seizure on the high seas under a municipal regulation, if the property be immediately carried into a port of the country to which the capturing vessel belongs, and there regularly proceeded against, I concur in the judgment just delivered, because The Sarah and her cargo were condemned by a French tribunal sitting at St. Domingo, without having been carried into that, or any other French port, and while lying in the port of Charleston, South Carolina, whither they had been carried, by and with the consent of the captor.

Cushing and Chase, Justices, concurred in opinion with Judge *Livingston.*

Johnson, J. This cause comes up on appeal from the circuit court of South Carolina, acting in the capacity of an instance court of admiralty. The doctrines which regulated the decision of the circuit court, are not overruled by a majority of the bench; but the decree of that court is rescinded, because to three of the five judges who concur in sustaining the appeal, it appears that the property could not be condemned in the court of St. Domingo, while lying in a neutral port: and to the other two, that the capture on the high seas, for a breach of municipal regulation, was contrary to the law of nations, and therefore vested no jurisdiction in the court of St. Domingo. On the former doctrine it is not

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necessary to make any observations, because in the case of the *Sea-flower*, argued together with this as one cause, and decided on the same day, that doctrine is expressly overruled. But on the latter point I think it proper, briefly to state the reasons upon which I found my disapprobation, both of the doctrine and of its application to this case.

It would have been some relief to us in determining this question, had it been made a point by counsel, either in their argument in this court, or in the court below; but it appears to have been wholly unnoticed by them.

Most of the difficulties which have occurred in the investigation of this case, appear to have resulted from an indistinct view of the nature, origin, and object of prize courts. Conducted by the same forms, and very generally blended in the same persons, it is not easy to trace upon the mind, the discriminating line between the *instance* and *prize* courts; yet the object of the institution of the latter court, when considered, strongly marks the distinguishing point between them. In its ordinary jurisdiction, the admiralty takes cognizance of mere questions of *meum* and *tuum* arising between individuals; its extraordinary or prize jurisdiction is vested in it for the purpose of revising the acts of the sovereign himself performed through the agency of his officers or subjects. A seizure on the high seas by an unauthorised individual, is a mere trespass, and produces no change of right, but such a seizure made by sovereign authority, vests the thing seized in the sovereign; for the fact of possession must have all the beneficial effects of the right of possession, as the justice or propriety of it cannot be inquired into by the courts of other nations. But as this principle might leave the unoffending individual a prey to the rapacity of cruisers, or a victim to the errors of those who even mean well, and as every civilized nation pretends to the character of justice and moderation, and to have an interest in preserving the peace of the world, they constitute courts with powers to inquire into the correctness of captures made under colour of their own authority, and to give redress to those who have been unmeritedly attacked or injured. These are denominated prize courts, and the primary

object of their institution, is to inquire whether a taking as prize, is sanctioned by the authority of their sovereign, or the unauthorised act of an individual. From this it would seem to follow, that the decision of such a court, is the only legal organ of communication, through which the sanction of a sovereign can be ascertained, and that no other court is at liberty to deny the existence of sovereign authority, for a seizure which a prize court has declared to be the act of its sovereign.

The propriety of such an act may correctly become the subject of executive or diplomatic discussion; but the equality of nations forbids that the conduct of one sovereign, or the correctness of the principles upon which he acts, should be submitted to the jurisdiction of the courts of another. From these considerations I infer, that the capture and continued possession of *The Sarah* and her cargo, confirmed by the approbatory sentence of a court of the capturing power, vested a title in the claimant, which this court cannot, consistently with the law of nations, interpose its authority to defeat.

Having briefly stated the grounds upon which I originally formed, and now adhere to an opinion in favour of the claimants, I will consider the objections stated to the jurisdiction of the court, on the ground that the seizure was contrary to the law of nations.

It is admitted, if the court of St. Domingo had jurisdiction of the subject matter, that the condemnation completed the divestiture of property. But it is contended that the subject, in this case, was not within their jurisdiction, because it was seized for a cause not sanctioned by the law of nations. I am unfortunate enough to think that neither the premises nor the conclusion of this argument, are maintainable. The conclusion is subject to this very obvious objection; that it defeats the very end for which such courts were created.

To contend that a violation of the law of nations will take away the jurisdiction of a court, which sits and judges according to the law of nations, appears to approach very near to a solecism. The occurrence which gives it jurisdiction, takes it away.

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If the object and end of constituting a prize court be to give redress against unlawful capture, and, as the books say, in such case to restore *velis levatis*, how can it make reparation to the injured individual if it loses its jurisdiction; because there has been an injury done to him, the court can give him no redress. The argument admits, that a capture consistent with the law of nations, would give jurisdiction, but how is the legality or illegality of a capture to be determined, unless a court can take jurisdiction of the case. The legality of the capture is the very point to which a court is to direct its inquiries, and yet that inquiry is arrested in its inception. The cause or circumstances of a capture can never be known to a court, without exercising jurisdiction on the subject. To maintain therefore, that prize courts can only exercise jurisdiction over captures, made consistently with the law of nations is, in effect, to deprive them of all jurisdiction, since it leaves no means of deciding the question on which their jurisdiction rests.

But the premises which lead to this conclusion, will be found no less exceptionable than the conclusion itself; and the propriety of taking into consideration the questions which form those premises very questionable. The opinion of those of my brethren who maintain this doctrine, is founded upon two propositions.

1. That a nation cannot capture, on the high seas, a vessel which has within her territories, committed a breach of a municipal law.

2. That the condemnation in this case, was grounded on an offence against a municipal law.

To me it appears wholly immaterial on what grounds the decision be founded, if the case be within their jurisdiction. Indeed, this is fully admitted by those of the court, who maintain the doctrine that I am considering; but under the idea of examining the jurisdiction of the court, they appear to me to go farther and examine into the correctness of its decision. I do not deny that there are circumstances material to the effect of sentences of foreign prize courts, into which other courts may

inquire. The authorities quoted on this point relate exclusively to two, viz.

1. Whether the court is held in the territory of the sovereign who constitutes it.

2. Whether the subject was *sub potestate* of the sovereign whose courts condemned it.

These circumstances have an immediate relation to the existence of the court, and of its power of acting upon the subject; but within its legitimate scope of action, the correctness of its proceedings, or of the rules of decision by which it is governed, cannot, in the nature of things, and consistently with the idea of perfect equality and independence, be subjected to the review of other courts.

The decisions of such courts do not derive their effect from their abstract justice; they are in this respect analogous to the acts of sovereignty. They are universally conclusive, because no where subject to revision. Among nations they are considered as entitled to the same validity as the decisions of municipal courts, within their respective territories, and preclude the rights of parties, although contrary to every idea of law, reason and evidence.

The court of St. Domingo being a court of co-ordinate authority with this, was equally competent to decide a question of jurisdiction arising under the law of nations. Had the question whether a seizure under municipal law, upon the high seas, was contrary to the law of nations—or, if contrary to the law of nations, whether the court could not therefore exercise jurisdiction upon it, been brought to the notice of that court, it is presumed that their decree would not have been void, because they maintained the negative of the proposition. Had it been made a question before that court, whether the laws of France authorised the capture of The Sarah at ten leagues distance from the coast, or whether in fact the vessel was not seized within two leagues of the coast, it is presumed that their decision upon these points would have been conclusive, whatever may be the im-

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pression of this court from the evidence now before us. It is impossible for this court to pretend to a knowledge of all the facts by which the decree of that court may have been regulated. The decree itself shows that the whole evidence is not before us; but if it were, that court is sole arbiter, both of the effect of testimony, and the credibility of witnesses. A similar observation may be made with regard to the laws of France, which much pains has been taken to prove, did not authorise this capture. How can this court be supposed to know all the laws, sovereign orders, or received principles which regulate the decisions of foreign courts. Such courts are best acquainted with the laws of their own government, and their decision upon the existence or effect of those laws must, in the nature of things, be conclusive in the eyes of other nations. Suppose that other courts were so far at liberty as to review the grounds upon which such decrees *profess* to proceed, the insufficiency of those grounds would not be conclusive against the correctness of such decisions, because they may be maintainable upon other grounds, not noticed, or even not known to the judge who pronounces them.

But if we are to look into the grounds upon which a decree is professedly founded, extravagant as that upon the case of The Sarah is said to be, there is one view in which it may admit of justification. General Ferrand in his preamble declares it to be his leading object to remove the contrariety of opinion which existed among the officers of government relative to existing laws, respecting captures of vessels taken upon the coasts of St. Domingo. If their judges thought proper to consider this arrete as only declaratory of pre-existing laws, and that the words in the first article, "ceux expedié "pour les portes en leur possession en sortant avec ou "sans chargement," authorised the capture of vessels outward bound, I know no reason that *we* can have to declare it a misconstruction or incorrect opinion, or, if incorrect, to nullify their decree on that account. The conclusiveness of a foreign sentence appears to be at an end, the moment other courts undertake to look into the cause for which a capture was made. If the possession of the captor is the possession of his sovereign, and his courts have a right therefore to adjudicate property cap-

tured, or carried into a foreign port, it appears to me to be immaterial on what ground the capture is made. The fact of dispossession by sovereign authority, judicially ascertained, deprives all other courts of the right to act upon the case.

Upon these considerations I have adopted the opinion that we are not at liberty to enter into the inquiry, whether the capture of The Sarah was made in pursuance of belligerent or municipal rights. But if we are to enter into the inquiry, I am of opinion that the evidence before us plainly makes out a case of belligerent capture, and, though not so, that the capture may be justified, although for the breach of a municipal law.

In support of my latter position, both *principle*, and the *practice* of Great Britain and our own government may be appealed to.

The ocean is the common jurisdiction of all sovereign powers; from which it does not result that their powers upon the ocean exist in a state of suspension or equipoise, but that every power is at liberty upon the ocean to exercise its sovereign right, provided it, does no act inconsistent with that general equality of nations which exists upon the ocean. The seizure of a ship upon the high seas, after she has committed an act of forfeiture within a territory, is not inconsistent with the sovereign rights of the nation to which she belongs, because it is the law of reason, and the general understanding of nations, that the offending individual forfeits his claim to protection, and every nation is the legal avenger of its own wrongs. Within their jurisdictional limits the rights of sovereignty are exclusive; upon the ocean they are concurrent. Whatever the great principle of self defence in its reasonable and necessary exercise will sanction in an individual in a state of nature, nations may lawfully perform upon the ocean. This principle, as well as most others, may be carried to an unreasonable extent; it may be made the pretence instead of the real ground of aggression, and then it will become a just cause of war. I contend only for its reasonable exercise. The act of Great Britain, of the 24 Geo. III. c. 47. is predicated upon these principles. It subjects vessels to

seizure, which approach with certain cargoes on board, within the distance of four leagues of her coast, because it would be difficult, if not impossible to execute her trade laws, if they were suffered to approach nearer in the prosecution of an illicit design. But if they have been within that distance, they are afterwards subject to be seized on the high seas. They have then violated her laws and have forfeited the protection of their sovereign. The laws of the United States upon the subject of trade, appear to have been framed in some measure after the model of the English statutes; and the 29th section of the act of 1799, expressly authorises the seizure of a vessel that has, within the jurisdiction of the United States, committed an act of forfeiture, wherever she may be met with by a revenue cutter, without limiting the distance from the coast. So also the act of 1806, for prohibiting the importation of slaves, authorises a seizure beyond our jurisdictional limits, if the vessel be found with slaves on board, hovering on the coast; a latitude of expression that can only be limited by circumstances, and the discretion of a court, and in case of fresh pursuit, would be actually without limitation. Indeed, after passing the jurisdictional limits of a state, a vessel is as much on the high seas as if in the middle of the ocean; and if France could authorise a seizure at the distance of two leagues, she could at the distance of twenty.

But the capture of The Sarah may fairly be considered as an exercise of belligerent right, and strictly analogous to seizure for breach of blockade. The right of one nation to exclude all others from trading with her territories, exists equally in war and in peace. Had the exclusion in this case been merely calculated for the interests of trade, it may have been considered as purely municipal. But there existed a war between the parent state and her colony. It was not only a fact of the most universal notoriety, but officially notified in the gazettes of the United States, by the proclamation of the French resident M. Pichon, who at the same time publishes the prohibition to trade with the revolters, with a declaration that seizure and confiscation should be the consequence of disobedience to this prohibition. Here then was notice of the existence of war, and an assertion

of the rights consequent upon it. The object of the measure was not the promotion of any particular branch of agriculture, manufacture, or commerce, but solely the reduction of an *enemy*. It was therefore not merely municipal, but belligerent in its nature and object. If France had a right to subdue the revolted colony, she had an undoubted right to preclude all nations from supplying them with the means of protracting the war. To confine her to her own jurisdictional limits, in the exercise of those acts of force which were necessary to carry into effect her right of excluding neutrals, would be a mere mockery, when by the very state of things she was herself shut out from those limits. Seizure on the high seas for a breach of the right of blockade, during the whole return voyage, is universally acquiesced in as a reasonable exercise of sovereign power. The principle of blockade has indeed in modern times been pushed to such an extravagant extent as to become a very justifiable cause of war, but still it is admitted to be consistent with the law of nations, when confined within the limits of reason and necessity. The right to subdue an enemy, carries with it the right to make use of the necessary means for that purpose, and the individual who does an act inconsistent with the rights of a belligerent, exposes himself to the liability to be treated as an enemy. The belligerent nation can exercise the same acts of violence against him that she can against an individual of her enemy. Nor can his sovereign protect an individual who has committed an aggression upon belligerent rights without becoming a party to the contest.

The argument drawn from the decree of Ferrand, to prove that France had not asserted her belligerent rights, is evidently founded upon a mistranslation. The sentence which authorises the seizure of vessels when outward bound, after having entered the ports of St. Domingo, is *substantive*, and totally unaffected by the subsequent sentence, which authorises a seizure of vessels sailing within two leagues of the coast. The former authorises capture for the offence of having entered those ports; the latter, for being found in a situation from which an intention to commit that offence shall be inferred. Nor, if the fact were so, that she had limited the right of capture to two leagues from her coast, would

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it follow that this was an exercise of municipal right; because a nation may restrict her subjects, in the exercise of belligerent rights, to a certain distance from the coast, or even to her jurisdictional limits, and yet the character of the seizure would be in no wise changed. If the object of the seizure is to promote the reduction of an enemy, it is an exercise of the rights of war.

From these considerations I conclude that the capture of The Sarah was justifiable upon principles not at all dependent upon municipal regulation; that it may fairly be considered as having been made in conformity with the law of nations, and, therefore, without acceding to the doctrine that a seizure contrary to the law of nations was a void seizure, and that we have a right to declare that a mere marine trespass which a court of France has declared to be the act of its sovereign, I conclude that the court of St. Domingo had jurisdiction in this case; and if it had jurisdiction, it is admitted that the property was altered, and the libellant ought not to recover.

Let it be observed that this is not an application on behalf of the vendee of the captor for the aid of this court to secure to him the benefit of his purchase. We find him in possession, and the application is for our aid to divest that possession, and restore it to the original owner. This owner was clearly an offender against the rights of France, and his only claim upon the interference of this court is, that he had escaped, with the property thus acquired, beyond two leagues from the shore of the nation that he had offended. In such a case it would be enough for all the purposes of the defendant, if this court would imitate the state of our nation, and remain neutral between the parties.

Let it not be supposed that the opinion which I am giving devotes the commerce of our country to lawless depredation. My observations are applied to a case in which an evident aggression has been committed, by entering at least two of the interdicted ports of St. Domingo. The individual who will knowingly violate the rights of war, or laws of trade of another nation, is well apprised that he forfeits all claim to the protection of his country, or the interference of its courts. The peace of

the nation, and the interests of the fair trader, imperiously require that the smuggler, or the violator of neutrality, should be left to his fate.

If I had no other reason to satisfy my mind of the correctness of the doctrines that I have been contending for, a conviction of their importance to the peace and security of the mercantile world would alone induce me to maintain them. The purchase of these goods was made in a Spanish port, under sanction of an agent of the French government, apparently countenanced by the government of the country in which he acted, and is sanctioned by a condemnation. If in the purchase of articles of merchandize in a foreign port, under the sanction of sovereign authority, it is nevertheless necessary, in order to acquire a good property, that a merchant should know whether they were captured by law or without law, under the law of nations, or under municipal law, the office of a lawyer will be as necessary to his education as the counting house. Articles of commerce passing from hand to hand by mere delivery, often remaining for years in the same packages, distinguished by the same marks, may admit of identification after any length of time, in the remotest countries, and in the hands of the most innocent purchasers. But if a seizure by a sovereign, upon a ground which any court may adjudge unsanctioned by the law of nations, is tantamount to no seizure, and nothing done in pursuance of it can transfer a good property, where is the uncertainty to end? With regard to ships the inconvenience may not be so great. Every merchant knows that a vessel must be accompanied with her document papers, so that the purchaser may come to the knowledge of her having passed through a capture and condemnation, and be put on his guard against so precarious a title. He will know that he is liable to be dispossessed according to the varying constructions of the law of nations that may prevail in different countries; yet he knows the full value of a property thus embarrassed. But in the purchase of merchandize he has no security, unless indeed he purchases them immediately from the manufacturer or the planter. It is a subject of curious speculation how far the pursuit or research after merchandize thus situated may be carried; whether the same principle may not extend it into the

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hands of the retailer or even the consumer. In one of the cases arising out of the capture of The Sarah, I mean that against Groning, the property is libelled in the hands of a purchaser withou notice, after it was landed in this country. If we can go so far, I see not where we are to stop. Every subsequent purchaser, even the remotest, as far as the article will admit of identification, is in no better situation than the defendant Groning, and liable, upon the same principle, to be dispossessed. After going beyond the fact of seizure by sovereign authority within his own territory, (where he is supreme,) or upon the ocean, (where he is equal to all others,) unaffected by escape, recapture or release, (by which property is restored to its state before seizure,) the approbatory sentence of his own court—(by which alone it can be judicially known to be the act of the sovereign)—beyond these limits every step that a court takes can only be productive of doubt, litigation and uncertainty, and involve the commercial world in endless embarrassment, at the same time that it compromits the peace of nations, among whom it is a received and correct opinion, that a want of due deference to the jurisdiction of their maritime courts is a just cause of war.

Sentence of the Court, March 2, 1808.

This cause came on to be heard on the transcript of the record, and on sundry exhibits introduced into the case in this court, and was argued by counsel, on consideration whereof, it appearing that The Sarah with her cargo were seized without the territorial jurisdiction claimed by the French government of St. Domingo, for the breach of a municipal regulation, and having never been carried within that jurisdiction, were sold by the captor in a foreign port, and afterwards condemned by the court of St. Domingo, as having violated the laws for regulating the commerce of French and foreign vessels with that colony, which laws authorise a seizure of vessels found within two leagues of the coast; it is the opinion of the court, that the seizure of The Sarah and her cargo is to be considered as a marine trespass, not vesting the possession in the sovereign of the captor, or

giving jurisdiction to the court which passed the sentence of condemnation, and, therefore, that the said sentence did not change the property in The Sarah and her cargo, which ought to be restored to the plaintiffs, the original owners, subject to those charges of freight, insurance and other expenses which would have been incurred by the owners in bringing the cargo into the United States, which equitable deductions the defendants are at liberty to show in the circuit court. This court is therefore of opinion, that the sentence of the circuit court of South Carolina ought to be reversed, and the cause be remanded to that court, in order that a final decree may be made therein, conformably to this opinion.

HUDSON AND OTHERS v. GUESTIER, AND LAFONT v. BIGELOW

THESE cases were argued in connexion with that of *Rose* v. *Himely*.

If a vessel, seized by a French privateer, within the territorial jurisdiction of the government of St. Domingo, for breach of the French municipal law prohibiting all intercourse with certain ports in that island, be carried by the captors directly to a Spanish port in the island of Cuba, she may, while lying there,

MARSHALL, Ch. J. delivered the opinion of the court, as follows:

This case differs from that of Rose v. Himely in one material fact. The vessel and cargo, which constitute the subject of controversy, were seized *within the territorial jurisdiction of the government of St. Domingo*, and carried into a *Spanish* port. While lying in that port, proceedings were regularly instituted in the court for the *island of Guadaloupe*, the cargo was sold by a provisional order of that court, after which the vessel and cargo were condemned. The single question, therefore, which exists in this case is, did the court of the captor lose its jurisdiction over the captured vessel by its being carried into a Spanish port.